

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

FUTUREWISE,

Appellant,

v.

CENTRAL PUGET SOUND GROWTH
MANAGEMENT HEARINGS BOARD, an
agency of the State of Washington, and CITY
OF BOTHELL,

Respondent.

No. 37716-1-II

Unpublished OPINION

Hunt, J. — Futurewise appeals the decision and order of the Central Puget Sound Growth Management Hearings Board (Board) dismissing its petition for review of the housing element portion of the City of Bothell’s comprehensive plan. Futurewise argues that (1) the Board was overly deferential to Bothell when it approved Bothell’s comprehensive plan; (2) the Board erroneously interpreted RCW 36.70A.070(2)(d); (3) substantial evidence does not support the Board’s decision that Bothell’s housing element satisfies the Growth Management Act’s (GMA’s)¹ requirements; and (4) the Board erroneously interpreted RCW 36.70A.540.

Bothell counters that (1) the Board properly determined that its (Bothell’s) comprehensive plan satisfies RCW 36.70A.070(2)’s requirements; (2) we should not reach the substantial evidence issue because Futurewise did not raise this issue in its previous superior court appeal; (3) if we do reach this issue, substantial evidence supports the Board’s decision and order; and (4) the

¹ Chapter 36.70A RCW.

superior court did not erroneously interpret RCW 36.70A.540. We affirm.

FACTS

In December 2006, Bothell's city council approved Ordinance No. 1973 (2006), amending Bothell's comprehensive plan. Futurewise petitioned the Board for review of the plan, alleging that the plan failed to meet various requirements of the GMA.

After hearing oral argument, the Board found, as a preliminary matter, that Futurewise had abandoned several issues because it had failed to brief them;² thus, the only issue before the Board was whether Bothell's comprehensive plan contained a housing element satisfying RCW 36.70A.070(2). Ultimately, the Board determined that Futurewise had not met its burden of showing that the plan was clearly erroneous and dismissed Futurewise's petition for review. Futurewise appealed the Board's dismissal to the superior court, which affirmed the Board's decision in its entirety.

Futurewise appeals.

ANALYSIS

Futurewise argues that the Board erred in according deference to Bothell's housing element. Futurewise contends that Bothell's housing element "clearly falls short of the requirements set out in RCW 36.70A.070(2)" because, in essence, there is an "absence of required policies and steps in Bothell's Housing Element." Br. of Appellant at 17. Futurewise also argues that substantial evidence does not support the Board's decision that Bothell's housing

² Futurewise does not argue on appeal that the Board erred when it found that Futurewise abandoned these issues.

element satisfies the GMA's requirements, and that the Board erroneously interpreted RCW 36.70A.070(2)(d) and RCW 36.70A.540. These arguments fail.

I. Standards of Review

A. Administrative Review

Growth Management Hearing Boards "adjudicate issues of GMA compliance and may invalidate noncompliant comprehensive plans." *Thurston County v. W. Wash. Growth Mgmt. Hearings Bd.*, 164 Wn.2d 329, 340, 190 P.3d 38 (2008) (citing RCW 36.70A.280(1)(a), .302). "[C]omprehensive plans . . . are presumed valid upon adoption." RCW 36.70A.320(1). The petitioner has the burden of demonstrating that the local government's actions do not comply with the requirements of the GMA. RCW 36.70A.320(2).

"The board shall find compliance unless it determines that the action by [the local government] is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA]." RCW 36.70A.320(3). "To find an action 'clearly erroneous,' the Board must have a 'firm and definite conviction that a mistake has been committed.'" *Thurston County v. W. Wash. Growth Mgmt. Hearings Bd.*, 164 Wn.2d at 340-41 (quoting *Lewis County v. W. Wash. Growth Mgmt. Hearings Bd.*, 157 Wn.2d 488, 497, 139 P.3d 1096 (2006)).

B. Judicial Review

When reviewing a decision by the Board, we stand in the same position as the superior court sitting in its appellate capacity and apply Administrative Procedure Act (APA)³ standards.

³ Chapter 34.05 RCW.

Thurston County v. W. Wash. Growth Mgmt. Hearings Bd., 164 Wn.2d at 341; *Thurston County v. Cooper Point Ass’n*, 148 Wn.2d 1, 7, 57 P.3d 1156 (2002). We review the Board’s legal conclusions de novo, while giving substantial weight to its interpretation of the GMA. *Low Income Housing Inst. v. City of Lakewood*, 119 Wn. App. 110, 114-15, 77 P.3d 653 (2003) (citing *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998)). We review the Board’s findings of fact for substantial evidence. *Diehl v. Mason County*, 94 Wn. App. 645, 652, 972 P.2d 543 (1999).

Under the APA, the party appealing the Board’s action has the burden of demonstrating that the action was invalid. RCW 34.05.570(1)(a); *Thurston County v. W. Wash. Growth Mgmt. Hearings Bd.*, 164 Wn.2d at 341. We may grant relief in nine different circumstances, including when the agency has erroneously interpreted the law or where substantial evidence does not support the agency’s order. RCW 34.05.570(3). Evidence is substantial when the evidence is of a sufficient quantity to “persuade a fair-minded person of the truth or correctness of the order.” *Thurston County v. W. Wash. Growth Mgmt. Hearings Bd.*, 164 Wn.2d at 341 (quoting *City of Redmond*, 136 Wn.2d at 46).

II. Growth Management Act

“The legislature enacted the GMA in 1990 to coordinate the State’s future growth via comprehensive land use planning.” *Viking Props., Inc. v. Holm*, 155 Wn.2d 112, 125, 118 P.3d 322 (2005). RCW 36.70A.020 provides planning goals for local governments, which are required, or choose, to create comprehensive plans; these goals include a housing element:

Housing. Encourage the ability of affordable housing to all economic segments of the population of this state, promote a variety of residential densities and housing

types, and encourage preservation of existing housing stock.

RCW 36.70A.020(4). Thus, a local government’s comprehensive plan must include a “plan, scheme, or design” for

[a] housing element ensuring the vitality and character of established residential neighborhoods that: (a) Includes an inventory and analysis of existing and projected housing needs that identifies the number of housing units necessary to manage projected growth; (b) includes a statement of goals, policies, objectives, and mandatory provisions for the preservation, improvement, and development of housing, including single-family residences; (c) identifies sufficient land for housing, including, but not limited to, government-assisted housing, housing for low-income families, manufactured housing, multifamily housing, and group homes and foster care facilities; and (d) makes adequate provisions for existing and projected needs of all economic segments of the community.

RCW 36.70A.070(2).

III. Deference to Bothell’s Housing Element

Futurewise argues that the Board erred in according deference to Bothell’s housing element. Futurewise contends that Bothell’s housing element “clearly falls short of the requirements set out in RCW 36.70A.070(2)” because, in essence, there is an “absence of required policies and steps in Bothell’s Housing Element.” Br. of Appellant at 17. This argument fails.

We agree with Futurewise that the Board should find a comprehensive plan noncompliant with the GMA if the plan is inconsistent with the GMA’s “goals and requirements.” RCW 36.70A.320(3). Futurewise cites *Low Income Housing Inst.*, 119 Wn. App. at 116, in support of its argument that Bothell’s plan does not satisfy the GMA’s goals. In *Low Income Housing Inst.*, we reversed the Board’s dismissal of a petition to review Lakewood’s comprehensive plan

because the Board had failed to address whether and how the Lakewood plan met RCW 36.70A.020's housing goals. *Id.* at 116, 188. Here, in contrast, the Board clearly took these goals into account in its review of Bothell's plan. And, as we discuss below, the Board determined that Bothell's plan meets RCW 36.70A.070(2)(d)'s requirements.

IV. Interpretation of RCW 36.70A.070(2)(d); Substantial Evidence

Futurewise argues that we should reverse the Board's decision because (1) the Board erroneously interpreted the law; and (2) substantial evidence does not support the Board's Final Decision and Order. Ultimately, Futurewise asks us to "remand this case to the Board with instructions to review Bothell's proposed housing element in light of RCW 36.70A.070(2)'s mandatory requirements." Br. of Appellant at 28. This argument fails.

In its argument on appeal, Futurewise does not cite the Board's actual decision; instead, Futurewise relies on its misinterpretations of the Board's decision rather than the actual language the Board used. Nor does Futurewise cite any law supporting its interpretation of RCW 36.70A.070(2), as RAP 10.3(a)(6) requires.⁴ Contrary to Futurewise's contentions, the record is clear, primarily from the Board's Final Decision and Order, that the Board did consider Bothell's comprehensive plan in light of RCW 36.70A.070(2)'s requirements.

A. "Erroneous Interpretation"

Futurewise characterizes its argument as follows: "The Board Erred in Reaching the Legal Conclusion That the Requirements of RCW 36.70A.070(2) Are Purely Optional." Br. of

⁴ RAP 10.3(a)(6) requires that appellate brief arguments include citations to legal authority and relevant parts of the record.

Appellant at 17. Futurewise argues that (1) the Board “simply wrote the requirements of RCW 36.70A.070(2)(d) out of the GMA,” Br. of Appellant at 25; and (2) Bothell’s comprehensive plan failed to satisfy RCW 36.70A.070(2)’s requirement that Bothell make “adequate provisions to address the existing and projected needs of all economic segments of the community” because Bothell’s housing element “is composed largely of goals without specific implementation language.” Br. of Appellant at 20.

Contrary to RAP 10.3(a)(6), Futurewise provides no record cite to support its assertion that the Board concluded that RCW 36.70A.070(2)’s requirements are “purely optional” and “wrote [these] requirements . . . out of the GMA.” Based solely on Futurewise’s noncompliance with RAP 10.3(a)(6), we could decline to consider this issue further. *In re Disciplinary Proceeding Against Behrman*, 165 Wn.2d 414, 422, 197 P.3d 1177 (2008).

Moreover, contrary to Futurewise’s unsupported assertion, the Board did not conclude that RCW 36.70A.070(2)’s requirements were optional: The record shows the Board concluded that Bothell’s comprehensive plan satisfied the minimum requirements of RCW 36.70A.070(2) and that the “*GMA does not require that Bothell include mandatory incentive programs . . . [in] its housing element.*” Administrative Record (AR) at 430.

Similarly, contrary to Futurewise’s unsupported and erroneous assertion, the Board did not ignore RCW 36.70A.070(2)(d)’s requirements: The record shows the Board devoted over a page of analysis to RCW 36.70A.070(2)(d). First, the Board dismissed Futurewise’s argument that Bothell’s comprehensive plan fails to meet “standards” the Board created in reviewing other local governments’ comprehensive plans. Because the Board examines each plan in light of each

individual local government's circumstances, various local governments' plans do not become "standards" that other local governments must meet. Second, the Board identified examples of how Bothell's comprehensive plan meets RCW 36.70.070(2)(d)'s requirements. And third, the Board dismissed Futurewise's argument that Bothell's plan's lack of a "clearly-defined incentive program" means that it did not include "adequate provisions" for housing all economic segments because incentive programs are optional.

Deferring to the Board's interpretation of RCW 36.70A.070(2)(d), we affirm the Board's conclusion that the housing element of Bothell's plan contains "adequate provisions" for all economic segments that section requires. The Board identified the following "affordable housing strategies" in Bothell's comprehensive plan:

- Streamlined permitting process for [Accessory Dwelling Units]. *Imagine Bothell*, Policy HO-P14, at HO-23.
- Retention of mobile home parks, echoing our state's requirement of protecting mobile home residents from displacement under RCW 59.22.010(2). *Imagine Bothell*, Policy HO-P10, at HO-23.
- Special zoning designation for Senior Housing, which is already providing 535 units in operation, under construction, or in permit review. *Imagine Bothell*, at HO-16.
- [Residential Activity Center] zoning to encourage the development of housing in the central locations of the city, a traditional location for affordable housing, by providing opportunities for residential activity centers where the number of units is controlled by site and building envelope regulations rather than a density limit. *Imagine Bothell*, HO-9 and HO-20.

AR at 437-38 (footnote omitted).

Futurewise neither asserts that these Board findings were incorrect nor makes reasoned argument with citation to legal authority demonstrating why these provisions do not satisfy RCW 36.70A.070(2)(d).⁵ Instead, Futurewise baldly asserts, without supporting authority, that RCW

36.70A.070(2)(d)’s requirement—that a plan include “adequate provisions for existing and projected needs of all economic segments of the community”—means that the plan must include specific implementation language. Br. of Appellant at 20. We will not review issues or arguments that a party inadequately briefs, especially those lacking citation to authority, contrary to the requirements of RAP 10.3(a)(6). *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 416, 120 P.3d 56 (2005). Thus, this argument fails.

Futurewise also argues that a disparity between the need for affordable housing and the current supply of assisted housing units in Bothell requires Bothell “to incorporate planning that would make adequate provisions to address the actual need.” Br. of Appellant at 20. As Futurewise itself acknowledges, assisted housing is not the only method by which Bothell can address the need for affordable housing; thus, this argument is not persuasive. Furthermore, the Board specifically found that Bothell’s plan “includes sufficient land for housing all economic segments of its community.” AR at 439. Futurewise does not assign error to this finding; thus, it is a verity on appeal. *Greenen v. Bd. of Accountancy*, 126 Wn. App. 824, 830-31, 110 P.3d 224 (2005) (citing *Tapper v. Employment Sec. Dep’t*, 122 Wn.2d 397, 407, 858 P.2d 494 (1993)), *review denied*, 156 Wn.2d 1030 (2006) (“If the appellant does not assign error to the agency’s findings of fact in the final order, these facts are verities on appeal”).

B. Substantial Evidence

⁵ Futurewise devotes a large portion of its brief to explanations about what *other* local governments have included in their comprehensive plans, which the Board has found meet the requirements of the GMA in other localities. But these other Board decisions are not binding authority, do not bear on, and do not control whether Bothell’s plan is adequate. Furthermore, these irrelevant explanations do not satisfy the requirements of RAP 10.3(a)(6).

Futurewise argues that substantial evidence does not support the Board's decision.⁶

Again, without citation to the record, Futurewise asserts:

Rather than look for evidence that Bothell's plan would actually meet Bothell's well-defined need for additional affordable housing, the Board here decided that adequate provisions for affordable housing were an optional component of a housing plan under the GMA, so there was no need to look into the evidence.

Br. of Appellant at 27. Futurewise's argument fails.

The Board concluded, based on the record, that Bothell's housing element meets the minimum requirements of RCW 36.70A.070(2) and the GMA. Nowhere in its decision did the Board decide that RCW 36.70A.070(2)(d)'s requirement for adequate affordable housing provisions was optional. Furthermore, each of the affordable housing strategies that the Board identified is supported by the record, at the locations to which the Board cites in its decision.

V. RCW 36.70A.540: Optional Affordable Housing Incentive Programs

Futurewise next argues that the Board erroneously interpreted RCW 36.70A.540(1)(a). Specifically, Futurewise argues that the Board (1) erroneously presumed that "RCW 36.70A.540(1)(a) was the sole authority regarding incentives to provide affordable housing, whether contained in development regulations or comprehensive plans in general"; and (2) "missed the distinction between development regulations and other types of mandatory support

⁶ Bothell responds that we should decline to review whether substantial evidence supports the Board's decision because Futurewise did not raise that error in its appeal to the superior court. Bothell is correct; Futurewise did not raise this issue in its superior court appeal.

RAP 2.5(a) provides, "The appellate court may refuse to review any claim of error which was not raised in the *trial* court." (Emphasis added.) Here, however, the superior court acted in its appellate capacity, rather than its trial capacity; thus, we are not persuaded that RAP 2.5(a) allows us to decline to reach this issue. Furthermore, it is not necessary for us to address this procedural issue in order to resolve this case.

for affordable housing that may be included in a comprehensive plan.”⁷ Br. of Appellant at 26-27. Again, we decline to address this argument because Futurewise did not properly brief it. *Habitat Watch*, 155 Wn.2d at 416. Nor did Futurewise cite to the record to support this argument, contrary to RAP 10.3(a)(6).

We affirm the Board’s dismissal of Futurewise’s petition.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Bridgewater, P.J.

Armstrong, J.

⁷ Bothell counters that (1) Futurewise misreads the Board’s decision; and (2) RCW 36.70A.540(1)(a) makes incentives optional.